No. 15,049

United States Court of Appeals

For the Ninth Circuit

HONOLULU OIL CORPORATION, a corporation,

Appellant,

vs.

KATHARINE H. KENNEDY and MARK C. ELWORTHY, Executors of the Will of Frank Kennedy, Deceased,

Appellees.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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vs.

Katharine H. Kennedy and Mark C. Elworthy, Executors of the Will of Frank Kennedy, Deceased, *Appellees*.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

This is an appeal by Honolulu Oil Corporation ("Honolulu"), defendant below, from a summary judgment entered against it by the District Court on December 19, 1955, awarding to the executors of the will of Frank Kennedy, deceased, plaintiffs below, damages in the sum of $9,519.11 (R. 78).

Jurisdiction of the District Court was founded upon the provisions of Section 1332 of Title 28, United States Code, it being averred in paragraph III, p. 2

of the Complaint (R. 4) that at all relevant times Kennedy and each of the executors of his will were and are citizens of the State of California, and that defendant below, Honolulu Oil Corporation, is and was a citizen of the State of Delaware, and that the amount in controversy in the action exceeds, exclusive of interest and costs, the sum of $3,000.00. These averments were admitted by paragraph I, page 1 of the answer of Honolulu (R. 29). Jurisdiction of this court is founded upon the provisions of Section 1291 of Title 28, United States Code, in that the summary judgment entered by the District Court against appellant Honolulu on December 19, 1955, was a final decision of the District Court of the United States for the Northern District of California, Southern Division.

STATEMENT OF THE CASE.

For convenience and to the extent practicable, the executors of the will of Kennedy, plaintiffs below, will be herein referred to as appellees, and the defendant below will be herein referred to as Honolulu.

Appellees are executors of the will of one Frank Kennedy who died October 4, 1946 (R. 3). They are suing on behalf of Kennedy's estate for damages on account of alleged underpayments to Kennedy in his lifetime of various oil royalties by Honolulu and its predecesors in interest. These royalties were payable to Kennedy by reason of his ownership, during his lifetime, of certain interests in oil and gas bearing

properties. Kennedy assigned these interests to the predecessors in interest of Honolulu, which agreed to pay Kennedy various royalties if oil or gas were discovered and produced by them from the subject lands. Honolulu succeeded to the rights and liabilities of its predecessors in interest in regard thereto.

Appellees claim that due to an artificially depressed price for oil in the area involved, some of these royalty payments were not based upon the true value of the oil, and that hence they are entitled to an accounting for additional royalties for the period July 1, 1931 to August 29, 1935 (R. 53).

This action was commenced November 1, 1950 (R. 28), and the additional royalties, if any, became due at a peroid of time long prior to four years before the commencement of this action. It is conceded by the parties that the applicable statutes of limitation of the State of California have long since barred recovery, unless some fiduciary relationship existed between Kennedy and Honolulu or its predecessors in interest which would have prevented the running of the statute. The complaint avers the existence of a fiduciary relationship in a number of ways, and the answer denies the existence of any such relationship, and it is upon this principal issue that the case was decided below and upon which this appeal is taken.

A. The Complaint.

This action was commenced by the filing by appellees on November 21, 1950 (R. 28), in the District

Court of a complaint for an accounting and a money judgment from Honolulu on account of various royalty payments by Honolulu or its predecessors in interest to Frank Kennedy, which appellees aver did not represent the true value of the oil and gas produced by Honolulu or its predecessors from certain lands in which Kennedy had an interest (Complaint, par. XVI; R. 21).

Stating the pertinent averments of the complaint in summary form, it is therein averred (par. IV, p. 2 and elsewhere in the Complaint; R. 4-5) that Frank Kennedy on January 6, 1927, was the owner in fee of certain land in Fresno County described as follows:

> The South West Quarter (SW¼) of
> Section 22, Township 21 South,
> Range 17 East, M.D.B.&M.

This property will be hereinafter referred to as the "Kennedy fee land".

The complaint further avers (par. V; R. 5-7) that Kennedy was also the owner of certain oil and gas prospecting permits, rights and leases in other lands in the County of Fresno, State of California; Kennedy did not own these lands in fee but had operating rights therein by virtue of such prospecting permits and leases. These properties will be hereinafter referred to as the "Kennedy lease lands".

It is alleged (Complaint, par. V and elsewhere in the Complaint; R. 5-7) that Frank Kennedy entered into an arrangement of "coadventure" with

Kettleman Oil Corporation, a predecessor in interest of Honolulu, and that said arrangement of coadventure was embodied primarily in Exhibits A, B, C, D and E attached to the complaint; that Kennedy and Kettleman Oil Corporation were coadventurers and cotenants in the production of oil and gas from both the Kennedy fee land and the Kennedy lease lands. The complaint alleges the production of oil and gas from these lands and that pursuant to the provisions of the above lettered exhibits, Kennedy was entitled to various reserved and overriding royalties therefrom (Complaint, par. XII; R. 16-19). Later we shall have occasion to examine these averments of the complaint and the pertinent exhibits in greater detail.

The complaint further avers (pars. VI, VII, VIII and IX; R. 7-13) various mesne assignments and transfers of these lands and leases, it being averred that Honolulu succeeded to and assumed all the liabilities and obligations of its predecessors in interest under these assignments and transfers. Appellees averred that by reason of the execution of the documents attached to the complaint as Exhibits A through E inclusive, and the subsequent mesne assignments and transfers, the predecessors in interest of Honolulu became coadventurers and cotenants with Frank Kennedy in the lands and leases described in the complaint (Complaint, par. XII; R. 16-19) and that appellant Honolulu, as the successor in interest of all or some of the parties to these documents, occupies the same fiduciary relationship to Frank Kennedy and to appellees as did Honolulu's predecessors in interest.

The second claim or cause of action in the complaint (beginning at R. 25) seeks an accounting from Honolulu; the third claim or cause of action therein (beginning at R. 26) avers that Frank Kennedy reposed the greatest trust and confidence in Honolulu and its predecessors in interest and relied upon the royalty payments made by Honolulu and its predecessors as being full, true and correct which they were not in fact.

Although this action was not filed until November 21, 1950 (R. 28), the complaint does not indicate to what period of time it is addressed with respect to the alleged underpayments of royalty sought to be recovered, and on its face would apparently carry back to the time of the execution of the original leases and other arrangements entered into between Kennedy and appellant's predecessors in interest in January of 1927. The fact is, however, that no claim is made for any period other than the period July 1, 1931 to August 29, 1935 (R. 53).

B. The Answer to the Complaint.

Honolulu's answer to the complaint (R. 29) admits the due execution and delivery of all documents attached as exhibits to the complaint and admits Kennedy's ownership in fee of the Kennedy fee land, and admits his ownership of an interest by way of prospecting permits, leases and other arrangements in the Kennedy lease lands. In brief, the answer, however, expressly denies each and every averment of the complaint which states that any arrangement of

coadventure, cotenancy, trust and confidence, or fiduciary relationship of any other kind or character ever existed between Frank Kennedy or the appellees herein, on the one hand, and appellant Honolulu and its predecessors in interest on the other hand. The answer denies that any or all of such relationships were created by virtue of all or any of the documents attached to the complaint as exhibits, and denies that such relationships existed for any other reason whatsoever.

The answer further raises the defense that the claim of appellees, and each cause of action or count thereof, is and are barred by the applicable statutes of limitation of the State of California, to wit, Subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California and Section 343 of the Code of Civil Procedure of the State of California.

An additional defense of accord and satisfaction is pleaded as a third affirmative defense to the complaint (Answer; R. 43).

C. The Statement of Agreed Facts.

On August 17, 1955, there was filed in the cause a Statement of Agreed Facts (R. 45-57). Accompanying this Statement of Agreed Facts is a file of photostatic copies of documents entitled "Photostatic Copies of Exhibits 'A' to and including 'GG' ". All exhibits to the complaint are incorporated in this file of photostatic copies, together with certain other documents which will be later referred to herein. These documents have been transmitted to this court without

being printed in the record by reason of the number and length of the exhibits.

On November 14, 1955, there was filed in the action an addendum to the Statement of Agreed Facts (R. 71-73) to which reference will later be made.

The Statement of Agreed Facts and addendum thereto may be summarized briefly as follows:

1. The parties agree that appellees are the executors of the will of Frank Kennedy and entitled to bring this action; they are residents of the State of California and Honolulu is a Delaware corporation; the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

2. On January 6, 1927, Kennedy owned in fee the so-called Kennedy fee land, to wit, the Southwest Quarter (SW¼) of Section 22, Township 21 South, Range 17 East, M.D.B.&M.

3. Kennedy owned an United States Oil and Gas Prospecting Permit bearing Serial No. Visalia 09551 issued by the United States General Land Office, Department of the Interior, on May 28, 1921, which Kennedy acquired by assignment from the original owner; that this permit was subsequently renumbered Sacramento 019438, and that it covered some 2556.58 acres of land in Fresno County. This permit ripened into United States oil and gas leases numbered Sacramento 019438(c) and Sacramento 019438(d), and also into other oil and gas leases which, however, are not involved in this litigation.

4. There is attached to the Statement of Agreed Facts a file of photostatic copies of documents marked Exhibits "A" to and including "GG", and the original of each of these instruments was, on or about the date that each exhibit bears, executed and delivered to the persons, firms or corporations therein named. (Statement of Agreed Facts, pars. V and VI; R. 47, 48).

5. The Statement of Agreed Facts, par. V (R. 47-48) provides as follows:

> "The said Exhibits 'A' to and including 'GG' contained in said file so entitled and marked, are all the written, typed, or printed documents, letters and materials (except this Statement of Agreed Facts, matters admitted by the pleadings herein, statutes, regulations, adjudicated cases and matters of which this Court will take judicial notice) which have pertinency, relationship of any kind or materiality whatsoever to and in respect of any question arising in this litigation. The said exhibits in said file so entitled and marked are believed to be true, correct and complete copies of the originals of said Exhibits 'A' through 'GG' and they, or such substitutes therefor as counsel may agree upon in writing, shall be considered by Court and counsel in this action as and in lieu of the originals."

6. The royalties paid and payable to Frank Kennedy and appellees by appellant Honolulu and its predecessors in interest were only payable by reason of the terms, conditions and provisions of the aforementioned exhibits as they may severally relate to

either all or a specified part of the lands and interests in lands described in the Statement of Agreed Facts (par. VII; R. 48-51). The description of the lands in which Kennedy had an inteerst covers two categories of property: (a) the Kennedy fee land; and (b) the Kennedy lease lands; the latter being lands which Kennedy did not own but as to which he had reserved overriding royalties upon assignment by him of the interests which he had acquired under the above described oil and gas prospecting permits and the leases into which said permits ripened.

7. Appellant Honolulu, as successor in interest of Kettleman Oil Corporation, Ltd., Pacific Western Oil Company, and Kettleman and Inglewood Corporation, succeeded to all the rights and liabilities of these corporations in the subject lands, and now stands in the same position to Kennedy and appellees as did Honolulu's aforementioned predecessors in interest (Statement of Agreed Facts, par. VIII; R. 51).

8. Appellant Honolulu is engaged in the business of exploring, drilling and developing lands for oil and gas and in selling the crude products to others, but it has never been engaged in the business of refining crude oil or in selling the refined products therefrom. All of Honolulu's share of the oil production involved in this litigation was sold by appellant or its predecessors in interest in its crude state to other oil companies who purchased it, and the prices accepted by appellant Honolulu or its predecessors for such crude products were the prices offered and paid by

the oil companies purchasing at the place of production, and appellant and its predecessors in interest accepted the highest prices offered and paid for such oil and did not participate in any way in deciding or determining what prices would be paid by the purchasing companies for such products (Statement of Agreed Facts, par. IX; R. 51-52).

9. Appellant Honolulu and its predecessors in interest accounted to Kennedy and appellees at a royalty rate based and computed upon the prices received by appellant and its predecessors from the oil companies above referred to, and the mathematical computation of such payments made by appellant and its predecessors was and is correct. Appellant Honolulu and its predecessors represent and contend that such payments are the full payments to which Kennedy and appellees are and were entitled; whereas, appellees contend that during the period commencing July 1, 1931 and ending August 29, 1935, such payments were not the full or proper royalties. During this period Honolulu and its predecessors submitted to Kennedy monthly royalty statements accompanied by a check for such monthly royalty amounts and the checks were retained and cashed by Kennedy (Statement of Agreed Facts, par. X; R. 52-53).

10. Appellees' action and claimed right of recovery involves only (a) the production of crude oil, and (b) payments of royalty thereon *during the period of time beginning July 1, 1931 to and including August 29, 1935* (Statement of Agreed Facts, par. XI; R. 53-54).

11. All oil involved in this litigation was produced from lands, the operating rights to which had been transferred and set over to Kettleman North Dome Association. The lands subject to the Association are depicted on a certain map or plat attached to Exhibit "Y", which is one of the photostatic copies accompanying the Statement of Agreed Facts. This map or plat delineates two areas which are so-called "participating areas" and "non-participating areas." Lands included in the former were entitled to an allocation of royalties from all oil produced within the lands operated by the Association; whereas, lands in the "non-participating areas" were not, merely because of their inclusion in the Kettleman North Dome Association, entitled to any royalties unless there was actual production from such lands. There never was any actual production from the Kennedy fee land; the north half of the Kennedy fee land lay within the "non-participating areas" of the Association and, there never having been actual production from said land, it was not entitled to any allocation of royalties. The south half of the Kennedy fee land did lie within the "participating areas", but since Kennedy never consented to the inclusion of this south half in the Kettleman North Dome Association Unit Agreement, he was not entitled to the allocation of any production to the south half of his fee land. No production from the Kennedy fee land nor any proceeds from such production is or are involved in this litigation. This leaves as the sole source of any allocation of royalties the Kennedy lease lands. (Statement of Agreed Facts, par. XII; R. 54-55).

(The importance of this fact will become apparent in our discussion of the legal principles involved.)

12. The amount to which appellees are entitled if the statute of limitations has not run against their claim is the sum of $9,519.11, but if the applicable statutes of limitations of the State of California, or any of them, have barred their claim, then they are entitled to nothing. The Statement of Agreed Facts, the pleadings and the matters admitted therein, and the documents attached as Exhibits "A" to and including "GG", are all the material evidence in the case.

It is evident that since the appellees' claim for additional royalties covers only the period from July 1, 1931 to and including August 29, 1935, and since the present action was not commenced until November of 1950, the statute of limitations has long since run on the asserted cause of action, unless the statute never commenced to run because of the existence of some fiduciary relationship between Kennedy and the predecessors in interest of the appellant Honolulu.

D. The Present Posture of the Case.

It will be of assistance to this Court in the determination of this appeal to review the events leading up to the rendition by the Court below of its summary judgment in favor of appellees, which was entered on December 19, 1955.

On October 12, 1955, appellant filed herein a notice of motion and motion for summary judgment accompanied by the affidavit of Herbert W. Clark (R. 58,

60), said motion being made upon the ground that it appeared from the pleadings, the Statement of Agreed Facts and exhibits thereto annexed, and the said affidavit accompanying the motion that Honolulu was entitled to judgment as a matter of law. Thereafter, and on or about November 18, 1955, appellees herein filed a counter notice of motion and motion for summary judgment (R. 73) on the ground that it appeared as a matter of law that they were entitled to summary judgment. Said motions were noticed for hearing before the Court below, Judge Carter sitting, on November 28, 1955. At the time of that hearing it was called to the attention of Judge Carter by counsel for Honolulu that a case entitled "*Kennedy v. Seaboard Oil Company of Delaware*", Civil Action No. 22469-R, had been decided by Judge Harris of the United States District Court for the Northern District of California, Southern Division (reported in 99 Fed. Supp. 730); that this case involved the same basic documents and agreements as are involved in the present action, that case being an action by Kennedy against the Seaboard Oil Company, one of the other operating companies producing oil from lands in which Kennedy had an interest; that on September 6, 1951, Judge Harris in that action denied Seaboard's motion to dismiss on the ground that the complaint showed that the cause of action was barred by the statute of limitations. Judge Carter was further advised by counsel for Honolulu that after Seaboard's motion to dismiss had been denied, the parties entered into a Statement of Agreed Facts similar to the one in this action, and that thereafter counter

motions for summary judgment in the *Seaboard* case were heard before Judge Goodman. Judge Goodman in the *Seaboard* case, upon the hearing of the counter motions for summary judgment, referred to the order of Judge Harris on the motion to dismiss, which held that the action was not barred by the California statute of limitations, and concluded that both by reason of comity and also because of the evidence agreed to by the parties in the Statement of Agreed Facts, the action was not barred by the statute of limitations. Judge Goodman therefore granted summary judgment in favor of the plaintiffs in the *Seaboard* case.

These matters having been presented by counsel for Honolulu to Judge Carter in the Court below, he concluded in his Memorandum and Order of December 9, 1955 (R. 75), that comity required him to follow the decision in the *Seaboard* case and grant summary judgment in favor of appellees. Judge Carter did not independently consider whether the claim of appellees herein was barred as a matter of law; he concluded that the only material difference between the *Seaboard* case and the case at bar was the difference in defendants, and that therefore rules of comity required a similar decision in this case.

Appellant Honolulu does not rest this appeal on the ground that the Court below erred in following the decision of the District Court in the *Seaboard* case as a matter of comity, although it clearly was not bound to do so.

> *Dictograph Products Company v. Sonotone Corporation,* 230 Fed.2d 131 (C.A. 2, 1956)

Appellant Honolulu does contend that the judgment appealed from is erroneous for the reason that the decision and order of Judge Goodman relied upon by the Court below in the instant action, and followed by it as a matter of comity, were and are erroneous in determining that any fiduciary relationship existed between the parties to that case, and hence the decision of the Court below in the instant action was equally erroneous in necessarily determining that a fiduciary relationship existed between the parties to the instant action.

It is significant that in the *Seaboard* litigation the decision of Judge Harris was made on a motion to dismiss, and at a time when it would have been possible, upon a trial of the action, for the plaintiffs therein to have shown that a fiduciary relationship between the parties arose out of facts extraneous to the various leases, assignments and other documents attached as exhibits to the complaint in that action. Upon the motion for summary judgment in the *Seaboard* case, however, the Statement of Agreed Facts in that action precluded the existence of any such fiduciary relationship unless it arose out of the documents attached to the complaint as exhibits. Judge Goodman, however, in deciding the cross-motions for summary judgment in the *Seaboard* case, adopted the reasoning of Judge Harris in his order made upon the motion to dismiss. The posture of the case at the time of the motion to dismiss, and at the time of the cross-motion for summary judgment in the *Seaboard* case, was entirely different. This is

for the reason that at the time of the motion to dismiss there might have been evidence extraneous to the pleadings and exhibits which, if presented at a trial of the case, would have disclosed that a fiduciary relationship existed between the parties; at the time of the cross-motion for summary judgment, however, it was clear, under the Statement of Agreed Facts, that the *only* way in which plaintiffs in that case could show the existence of any fiduciary relationship was by demonstrating that such relationship was created by one or more of the documents attached to the complaint and exhibits.

The latter is now the precise situation in this case. Since the filing of the Statement of Agreed Facts herein, the "arrangement" of coadventure or cotenancy alleged by appellees to have existed between Kennedy and appellant's predecessors in interest must be found, if it exists at all, in some of or all the documents constituting Exhibits "A" to "GG" inclusive of the photostatic copies of exhibits accompanying the Statement of Agreed Facts.

Unless, therefore, one or more of these documents created a fiduciary relationship of some sort between Kennedy and appellant's predecessors in interest, it is clear that the statute of limitations has long since run on the appellees' claims and, hence, the judgment appealed from is erroneous and should be reversed.

We shall examine this proposition in detail later in this brief when commenting upon the various exhibits in question.

The attention of the Court is invited to the fact that the third cause of action of the complaint (par. II; R. 26) avers that Frank Kennedy at all times reposed the greatest confidence and trust in appellant and its predecessors in interest and in their representations that the payments made by them to Kennedy as royalties were full, true and correct, and that Kennedy relied upon such representations. Appellant's answer denies the averments concerning such fiduciary relationship, trust, confidence and reliance and because of such denials, the averments of trust, confidence and reliance are now out of the case, since it is expressly agreed in the Statement of Agreed Facts that, so far as the pleadings are concerned, only "the matters *admitted* by the pleadings" constitute material evidence in this case (Statement of Agreed Facts, par. XVI; R. 57).

This means that no concealment has been nor can be shown; no "trust, confidence and reliance" can be presumed; and no fraud has been averred by the appellees. It is clear, therefore, that the appellees must rely upon the contents of the exhibits or some of them to spell out their theory of fiduciary relationship.

THE QUESTIONS INVOLVED ON THIS APPEAL.

The questions involved on this appeal are:

1. Did the Court below err in adjudging that so much of appellees' cause of action or claim and each count thereof as pertains or relates to the period of

time prior to November 21, 1946, is not and are not barred by the applicable statutes of limitations of the State of California?

2. Did the Court below err, in necessarily holding in order to reach its determination, either that (a) a relationship of cotenancy or coadventure existed between Frank Kennedy or any of appellees herein, on the one hand, and appellant Honolulu or any of its predecessors in interest, on the other hand; or (b) that there was a confidential relationship, or any fiduciary relationship existing between Frank Kennedy or any of appellees herein, on the one hand, and appellant Honolulu or any of its predecessors in interest, on the other hand; or (c) that a relationship of trust and confidence, or trust or confidence, existed between Frank Kennedy or any of appellees herein, on the one hand, and appellant Honolulu or any of its predecessors in interest, on the other hand?

3. Did the Court below err in awarding appellees damages in the sum of $9,519.11 or in any sum whatsoever?

The manner in which these questions are raised is by an examination of the Statement of Agreed Facts on file herein, the photostatic copies of Exhibits "A" to and including "GG" accompanying said statement, and the matters admitted by the pleadings.

ARGUMENT.

POINT ONE.

THE COURT BELOW ERRED IN ADJUDGING THAT SO MUCH OF APPELLEES' CAUSE OF ACTION OR CLAIM AND EACH COUNT THEREOF AS PERTAINS OR RELATES TO THE PERIOD OF TIME PRIOR TO NOVEMBER 21, 1946, IS NOT AND ARE NOT BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS OF THE STATE OF CALIFORNIA.

This is simply another way of stating that appellees' entire cause of action is barred by the statute of limitations, since the claim of appellees is limited to that period of time between July 1, 1931 to and including August 29, 1935 (Statement of Agreed Facts, par. XI; R. 53-54). Appellees make no claim on account of underpayment of royalties after August 29, 1935. The money judgment in the sum of $9,519.11 awarded to appellees and herein appealed from by Honolulu relates only to such period of time; neither the whole nor any part of said amount is allocable to any period of time other than that from July 1, 1931 to and including August 29, 1935. The whole judgment therefore must stand or fall upon the answer to the question of whether appellees' cause of action was or was not barred by the applicable statutes of limitations of the State of California four years after the latter date, to wit, August 30, 1939.

The applicable statutes of limitations of the State of California are:

(a) Subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California, which provides a four-year period of limitation for:

> "An action upon any contract, obligation or liability founded upon an instrument in writing, * * *."

(b) Section 343 of the Code of Civil Procedure of the State of California which reads as follows:

> "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Whether appellees' cause of action be founded upon obligations arising out of a written instrument, or be cast in the form of a suit for accounting, it is barred by the above quoted sections of the California statute unless commenced within four years.

Alamitos Land Co. v. The Texas Company, 11 C.A.2d 614, 618; 54 Pac.2d 489 (1936);

West v. Russell, 74 Cal. 544; 16 Pac. 392 (1888).

Appellees concede that their cause of action and claim is barred on its face by the statute of limitations, and that hence the judgment appealed from is erroneous, unless the Court below was correct in determining that some sort of fiduciary relationship prevented the running of the statute. To demonstrate that the Court below erred in adjudging that the claim was not statute barred, appellant Honolulu will next take up the various grounds—in fact, the only grounds—upon which the Court below could have rested its determination that the claim was not statute barred.

POINT TWO.

THE COURT BELOW ERRED IN HOLDING, IN ORDER TO REACH THE RESULT THAT APPELLEES' CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS, THAT ANY RELATIONSHIP OF COTENANCY, COADVENTURE, CONFIDENTIAL RELATIONSHIP, FIDUCIARY RELATIONSHIP, OR RELATIONSHIP OF TRUST OR CONFIDENCE, OR ANY ONE OR MORE OF SUCH RELATIONSHIPS, EVER EXISTED BETWEEN FRANK KENNEDY OR THE APPELLEES HEREIN, ON THE ONE HAND, AND APPELLANT HONOLULU OR ANY OF ITS PREDECESSORS IN INTEREST, ON THE OTHER HAND.

The judgment of the Court below is necessarily predicated upon the judgment of Judge Harris on the motion to dismiss in the case of *Kennedy v. Seaboard Oil Company* heretofore referred to, and reported in 99 Fed. Supp. 730. We shall hereafter examine this decision, but since any holding of the Court below as to the existence of any relationship of cotenancy, coadventure or other fiduciary relationship between the parties is necessarily predicated upon the proposition that such relationship was created by the various contracts and agreements between the parties (all of which are included in the file of exhibits), we must first examine the pertinent documents before turning to the applicable law.

A. The Exhibits.

As we have already stated, but cannot too strongly emphasize, if any fiduciary relationship of whatever kind existed between Frank Kennedy and appellant's predecessors in interest it must have been created by, or must have arisen by reason of, various assignments, leases, contracts and other agreements between the parties, all of which are embodied in the file of

photostatic copies of Exhibits "A" through "GG" inclusive. We will therefore examine these. Before doing this, however, it is appropriate and correct to state that in none of the exhibits which relate to the so-called Kennedy lease lands is there to be found anything which accords to Kennedy or his executors any right to enter into possession or occupancy of any of the described so-called Kennedy lease lands for any purpose whatsoever or at all. In brief, appellant Honolulu and its predecessors in interest have and had the right to "* * * hold, enjoy and exercise the exclusive right to demand and under its terms to enter into possession and occupancy of * * *" such lands for the purpose of drilling and producing oil and gas therefrom. Now to examine Exhibits "A" through "G" inclusive in detail.

Exhibit "A". Exhibit "A" in the special folder accompanying the Statement of Agreed Facts is a copy of a grant deed dated January 6, 1927 by which Frank Kennedy and his wife granted to Kettleman Oil Corporation the Southwest Quarter of Section 22, Township 21 South, Range 17 East M.D.B.&M. (the Kennedy fee land). By it Kennedy conveyed *all* the property, reserving to himself and wife, however, 4½% of all the oil, casinghead gasoline and natural and dry gas (after deducting the costs of manufacture) produced and saved from a portion of the conveyed area; this deed also reserved 2½% of said hydrocarbon products produced and saved from another portion of the conveyed area. This deed further provided as follows:

> "All the terms and conditions of this reservation and/or exception shall be binding upon and inure to the benefit of the heirs, administrators, successors and assigns of the respective parties hereto and shall be construed as covenants running with the said lands hereinabove described."

This instrument shows that Kennedy and his wife were owners in fee of the property, all of which they conveyed to Kettleman Oil Corporation, reserving 4½% and 2½% of the oil and gas. The grantors thus reserved to themselves a portion of the "oil and gas estate", the balance of which was conveyed to the grantee. The legal effect of this deed will be discussed later.

Exhibit "B". Exhibit "B" is a copy of an assignment dated January 6, 1927, from Frank Kennedy to Kettleman Oil Corporation, whereby Kennedy assigned to Kettleman Oil Corporation "all his right, title and interest of every kind and nature" in and to United States Oil and Gas Prospecting Permit Serial No. Visalia 09551, covering the described property in Fresno County, which aggregated some 2556.58 acres (a portion of the Kennedy lease lands). The assignment further provides that Kettleman Oil Corporation, its successors and assigns, should hold, enjoy and exercise "the exclusive right to demand and under its terms to enter into possession and occupancy of the said lands for all purposes". This provision covered not only the permit but all extensions thereof. The assignee, Kettleman Oil Corporation, in consideration of this assignment agreed to *pay*

to Kennedy an overriding royalty equal to 5% of all the oil produced and saved from such portions of the lands as to which the United States might grant to Kettleman Oil Corporation a preferential 5% lease; Kettleman was to pay to Kennedy an overriding royalty of 3% as to all lands on which the United States granted to Kettleman a lease at a minimum royalty of 12½%. This agreement in turn provided that these provisions should be construed as "a reservation of the aforesaid overriding royalties and as covenants running with the said lands".

This instrument discloses that Kettleman had the exclusive right to go upon and operate the property, and its duty thereunder was to *pay* the stipulated royalties to Kennedy.

This agreement further provided for an additional overriding royalty of 2% to Kennedy on certain other lands, to wit, the northeast quarter of Section Twenty; the north half of Section Thirty; the north half of Section Twenty-eight, and the north half of the northeast quarter of Section Thirty-two, all in Township 21 South, Range 17 East, M.D.B.&M. (a portion of the Kennedy lease lands).

Exhibit "C". This document is an overriding royalty agreement dated January 6, 1927, between Kennedy and Kettleman Oil Corporation reciting that Kennedy had on that date assigned to Kettleman Oil Corporation all his right, title and interest in United States Oil and Gas Prospecting Permit No. Visalia 09551 (subject to the overriding royalties therein provided), and it recites that Kettleman has

agreed to sell and transfer to Kennedy additional royalties. The assignment then provides that Kettleman sells, assigns and transfers to Kennedy an overriding royalty of 2% on certain other lands therein described, that is, lands in which Kettleman had the operating rights but in which Kennedy had no interest whatever. This document created an obligation on the part of Kettleman to pay to Kennedy a royalty in an amount equal to 2% of the production from said lands and nothing more. These lands, the description of which is omitted for brevity, are also referred to herein as the Kennedy lease lands.

Exhibit "D". This is a supplementary overriding royalty agreement dated December 6, 1928, reciting the execution of the overriding royalty agreement of January 6, 1927 (Exhibit "C") and provides that Kettleman agrees to pay to Kennedy an *additional* overriding royalty of 2% on certain other lands described in Exhibit "D", the description of which is omitted for brevity. These are also referred to as the Kennedy lease lands, all of which are described in the Statement of Agreed Facts (par. VII; R. 49-51).

By this instrument Kettleman agreed to pay the stipulated overriding royalty to Kennedy from the described property, Kennedy having no interest whatever therein except as created by this document.

Exhibit "E". This might be said to be the last and most important operative document, the balance of the exhibits consisting mainly of mesne conveyances. We

shall therefore examine Exhibit "E" in slightly greater detail. It is an operating agreement dated January 6, 1927, between Kennedy and Kettleman Oil Corporation. It recites that whereas Kennedy owns Oil and Gas Prospecting Permit No. Visalia 09551 covering the 2556.58 acres (described in Exhibit "B"); and whereas he desired the exploitation of the property for oil and gas; and whereas Kettleman is financially able to do so, it is therefore agreed:

1. Kettleman is given the *exclusive* right to enter upon and to occupy the described land for the purpose of prospecting, drilling for, developing, producing, marketing and refining all oil, gas, casinghead gasoline, and other hydrocarbon substances;

2. Kettleman agrees to keep and perform all drilling obligations pursuant to the permit and all extensions thereof;

3. If oil and gas is discovered on the property Kennedy agreed to apply for a lease covering the property and to select as the acreage to be included in the 5% Government royalty area all of Section 28, Township 21 South, Range 17 East, M.D.B.&M., and he further agreed to assign any lease issued to him to Kettleman, subject to the approval of the Department of the Interior;

4. Kettleman agreed to pay to Kennedy the same royalties as specified in Exhibit "B" (the lands here are the same as those described in Exhibit "B");

5. Kennedy agreed without additional consideration at any time and on the request of Kettleman to

deliver to such persons as Kettleman should designate an instrument sufficient to assign to Kettleman, or its successors or assigns, all of Kennedy's interest in the permit, subject to the reservation of the above royalties; and

6. Kennedy represented that he had granted no undisclosed or adverse titles to the oil and gas on this property.

This document discloses that as to the Kennedy lease lands, Kennedy had only a right to enter and prospect under the United States Prospecting Permit; that he granted *all* right he had thereunder to Kettleman; that Kettleman's only obligations under the instrument were to comply with the terms of the permit and any extension thereof, and any lease which might thereafter be issued, and in the event of the discovery of oil and gas, to pay the stipulated royalties to Kennedy.

Exhibits "F" through "U" inclusive. Exhibits "F" through "U" inclusive are various mesne assignments and conveyances whereby the rights and obligations created by the foregoing Exhibits "A" through "E" inclusive, eventually came to be held and assumed by appellant herein. It would not aid in the determination of this appeal to trace at length these various assignments. It is agreed in the Statement of Agreed Facts (par. VIII; R. 51) that appellant succeeded to and assumed all the rights, liabilities and obligations of its predecessors in interest, Kettleman Oil Corporation, Pacific Western Oil Company, and Kettleman and Inglewood Corporation, in the lands affected by the foregoing exhibits.

Exhibits "V" and "W". Exhibit "V" is United States Oil and Gas Lease No. Sacramento 019438(c); Exhibit "W" is United States Oil and Gas Lease No. Sacramento 019438(d). These leases cover the lands described therein which are a portion of what we have referred to as the Kennedy lease lands.

Exhibit "X". Exhibit "X" is the Kettleman North Dome Unit Agreement. We shall not analyze this, and, in fact, do not understand what pertinency it has to any of the questions presented on this appeal.

Exhibit "Y". These are the articles of incorporation and by-laws of the Kettleman North Dome Association. The foregoing comment applies to this exhibit.

Exhibits "Z" and "AA". These exhibits were royalty owners' consents and agreements whereby Kennedy consented to Honolulu's predecessors in interest becoming members of the Kettleman North Dome Association with respect to all the property involved in this litigation except the south half of the southwest quarter of Section 22, Township 21 South, Range 17 East, M.D.B.&M. (see Statement of Agreed Facts, par. XII; R. 54).

Exhibit "BB". This is an agreement between Kennedy and Honolulu's predecessors in interest dated January 1, 1940, with reference to tolling the statute of limitations on any of Kennedy's claims pending the determination of the action brought by the United States of America against the General Petroleum Corporation. This is the action referred to in the affidavit

of Herbert W. Clark (R. 60). This agreement does not affect the questions upon this appeal since it did not purport to affect any rights which might have theretofore become statute barred.

Exhibit "CC". This is an undated copy of a document entitled "Assumption of Obligations" whereby Honolulu, among others, assumed the rights and obligations of its predecessors in interest (as has been already stipulated).

Exhibit "DD". This is a tabulation showing the additional amount of royalties to which appellees would be entitled, on their theory of the case, for the period from July 1, 1931 to August 29, 1935.

Exhibit "EE". This is a monthly statement submitted by Pacific Western Oil Company to Frank Kennedy covering the month of August 1934; it is an exemplar of the monthly statements submitted to and received by Kennedy during the period of time in question.

Exhibits "FF" and "GG". These are letters explaining why no allocation of royalties was ever due to Kennedy on account of the south half of the southwest quarter of Section 22, Township 21 South, Range 17 East, M.D.B.&M.

Exhibit "HH" (contained in addendum to the Statement of Agreed Facts). This is an exemplar of identical form letters sent during the period of time in question by Kennedy to Honolulu's predecessors in interest upon receipt by him of his monthly royalty

checks accompanied by the statement in the form of Exhibit "EE".

B. The Legal Effect of the Exhibits.

1. Did any or all of the various documents create a joint adventure between the parties?

Without again reviewing the exhibits, it is perfectly obvious that they are nothing more than the usual every-day assignments, leases and operating agreements in common use in the oil and gas industry. The legal effect of these documents must be judged by the applicable principles of law and not by any characterization found in appellee's complaint of these agreements, leases and other documents as constituting agreements of "cotenancy" or "coadventure".

Appellees speak of a "coadventure" as having existed between the parties, which must mean a joint adventure, since the terms in law are interchangeable. It is clear that none of the exhibits created a joint adventure between the parties because none of the essential elements of a joint adventure were present in any of them. These elements are clearly defined in the case of *Beck v. Cagle,* 46 C.A.2d 152, 115 P.2d 613 (1941) to be as follows: (a) a community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of the other parties to the adventure with respect thereto; (c) a share in the profits and in the losses, if any; and (d) a close or even fiduciary relationship between the parties.

At least two elements are always necessary to constitute a joint adventure, and these are, a community of interest and a sharing of profits and losses.

Quinn v. Recreation Park Association, 3 Cal.2d 725, 46 P.2d 144 (1935);

Heebner v. Senderman, 85 Cal. App. 196, 259 Pac. 106 (1927);

Howard v. Societa, etc., 62 C.A.2d 842, 145 P.2d 635 (1944).

A joint adventure or "coadventure" is often stated to be nothing more than a partnership undertaken by two or more persons jointly to carry out a single business enterprise for profit; in effect, a partnership for a single transaction.

Hansen v. Burford, 212 Cal. 100, 297 Pac. 908 (1931).

It is stated in the often cited case of *Motion Picture Enterprises v. Pantages,* 91 Cal. App. 677, 267 Pac. 550 (1928) at page 682:

> "* * * in order to bring a contract within the legal designation of a copartnership or a joint enterprise, it must appear that the parties thereto are associated together for the joint benefit of all; that they are joint owners of the property belonging to the association and share jointly in the profits as well as in the same proportion bear the losses that might result from the enterprise."

Testing the exhibits by these rules, it is clear that none of the documents created a joint adventure between the parties, since Kennedy would not share in any profits or losses of the operating companies. Simi-

larly, those companies would not share in any profits or losses of Kennedy. The operating companies agreed to pay Kennedy certain royalties in the event of the discovery of oil and gas. Kennedy had no right to direct or control the activities of the operating companies in regard to the operation of the properties, their rights of occupation and operation being exclusively in them. The companies had *all* the operating rights and Kennedy had a right to be paid royalties. There was no community of interest in the object of the undertaking or in the property involved.

Even if Kennedy and the operating companies had been co-owners of the lease, this would not of itself have created a joint adventure between them. In *Bowmaster v. Carroll*, 23 Fed.2d 825 (C.C.A. 8, 1928), several parties entered into an agreement to purchase an oil and gas lease. Each was to own an undivided one-fourth interest therein. The Court held, at page 827, that although they were joint owners of the lease this fact did not

> "* * * without more, establish between them the relation of joint adventurers * * *. Appellants failed to establish the existence of a combination between them * * * for the purpose of jointly making a profit at or prior to the time Walter Carroll acquired the assignment of the oil and gas lease."

The uniform rule in California, as stated in the case of *Spier v. Lang*, 4 Cal.2d 711, 53 P.2d 138 (1935), is that even though it be shown that there was to be a division of the profits of an enterprise this of itself does not establish a joint adventure. In the *Spier* case

the Court was considering whether a drilling contract created a joint adventure. Various persons had advanced money to enable the defendant to drill oil wells, and they were to receive certain percentages of the production therefrom after being reimbursed the money they had advanced. One question at the trial was whether a partnership or joint adventure existed between the parties. The trial court found that no joint adventure existed and, on appeal, plaintiff claimed that the fact that there was to be a division of the profits necessitated the finding that there was a joint adventure. The Supreme Court of California, however, in affirming the decision of the trial court, stated, speaking of the element of division of profits (p. 716):

> "But this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, * * * the presence of the same element is necessary to constitute the parties joint adventurers."

To the same effect:

Neet v. Holmes, 25 Cal.2d 447, 154 P.2d 854 (1944);

Stoddard v. Goldenberg, 48 C.A.2d 319, 119 P.2d 800 (1941);

Enos v. Picacho Gold Mining Company, 56 C.A. 2d 765, 133 P. 2d 663 (1943).

A case from New York contains a particularly apt statement of the reason why the appellees have

endeavored to characterize the exhibits as agreements of "coadventure". In *Weisner v. Benenson,* 89 N.Y.S. 2d 331, 275 App.Div. 324 (1949), the court was considering whether an agreement for the acquisition of property constituted a joint adventure, and the point was determinative of the case because the agreement was oral and otherwise unenforceable under the statute of frauds unless a joint adventure existed. The Court said at page 332:

> "This legal distinction for many years has caused parties desiring to enforce oral contracts for the conveyance of land to endeavor to spell out joint ventures or partnerships, in order to escape the bar of the statute of frauds. The evidence in litigations of this kind should be scrutinized in order to determine whether the facts warrant a conclusion that a joint venture or partnership was formed."

The remarks of the court in this case apply equally well to the bar of the statute of limitations.

Appellant Honolulu submits that none of the exhibits, whether taken separately or in their entirety, created any relationship of joint adventure between the parties, since:

(a) there was no community of interest in the object of the undertaking; the operating companies had all the operating rights and the rights to possession and Kennedy had a contract right to be paid royalties; neither party had an interest in anything that the other party had an interest in;

(b) there was no equal right to direct or govern the conduct of the other parties; and

(c) there was no sharing of profits or losses; Kennedy would have asserted this fact if the operating companies had drilled a dry well and then requested Kennedy to contribute toward the losses.

Tested by every rule adhered to by the California courts, neither all nor any of the pertinent documents established the relationship of joint adventurers or "coadventurers" between the parties.

No fiduciary relationship between the parties could have arisen out of their status as joint adventurers because that status did not exist.

2. Did any of or all the various documents create a relationship of co-tenancy between the parties?

Persons may be co-owners of property without being engaged in a joint adventure. It is therefore necessary to determine whether Kennedy and the operating companies were "cotenants" of any property, since appellees allege in their complaint that a fiduciary relationship arose because the parties were cotenants of something. In this connection we must deal separately with two categories of property involved in this litigation—first, the Kennedy fee land and second, the Kennedy lease lands.

First, as to the Kennedy fee land—Kennedy owned the land and all minerals therein in fee. By Exhibit "A" he *granted* this property to Kettleman Oil Corporation and *reserved* to himself a portion of the oil and gas estate. It is possible that Kennedy and Kettleman, as to the Kennedy fee land, were therefore

cotenants of the mineral estate, for the reason that all said mineral estate was originally owned by Kennedy; he conveyed a part of it and reserved a part of it, thus making his grantee and himself co-owners of the mineral estate. See, for example, *Little v. Mountain View Dairies,* 35 Cal.2d 232, 217 P.2d 416 (1950). This fact, however, is without legal significance since it is agreed in the Statement of Agreed Facts (par. XII; R. 54) that no production from or allocable to the Kennedy fee land is involved in this litigation. If Kennedy and Kettleman (and Kettleman's successors in interest) were cotenants of the oil and gas estate in the Kennedy fee land, that fact is without significance since this litigation does not involve any recovery in relation to such lands. The relationship of Kennedy and Kettleman, as to the Kennedy fee land, is therefore out of this case.

It is only from what we call the Kennedy lease lands that there was any production involved in this litigation. The crucial question therefore, on this phase of the matter, is whether any cotenancy existed between the parties as to the Kennedy lease lands?

Appellant points out that before the execution of the documents affecting the lease lands (Exhibits B, C, D and E) all that Kennedy had in regard to these lands was a United States Oil and Gas Prospecting Permit, which gave him the right to go upon the lands and prospect for oil and gas. Under any subsequent leases he would have no greater right, *i.e.,* he was simply to be a lessee of the United States, since the United States and not Kennedy owned this land. It

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is pertinent, therefore, to consider just what interest Kennedy conveyed by the execution of the documents referred to as Exhibits "B", "C", "D" and "E".

Kennedy did not by these documents reserve to himself (as in the case of the fee land) a portion of the oil and gas estate, *because he granted to the operating companies all his rights of entry and possession.* These documents demonstrate that not only did Kennedy assign everything he had to the operating companies, but that he was specifically excluded by these instruments from any rights of entry, operation or production thereunder. The operating companies in return promised to pay to Kennedy a royalty equal in amount to certain percentages of any oil or gas produced. Under this set of facts, of what *estate* could Kennedy and the operating companies have been cotenants? The Supreme Court of California answered this question in the landmark case of *La Laguna Ranch Co. v. Dodge,* 18 Cal.2d 132, 114 P.2d 351 (1941). The Court in this case settled once and for all that the only thing that an oil and gas lessee (this is all that Kennedy was) has in the way of an interest in the leased lands is a *profit a prendre,* that is, the right to go upon the property to remove a part of the substance of the land. When Kennedy assigned his oil and gas prospecting permits and other interests of a leasehold nature to the operating companies, he assigned away his entire *profit a prendre,* and there was nothing left in him of which he and the operating companies could be cotenants. As simply stated in the *La Laguna* case at page 138 of 18 Cal.2d:

"Similarly, while the operating lessee may assign an interest in his *profit a prendre* which is intended to make the assignee a tenant in common of his entire leasehold estate, he may, on the other hand, intend to retain in himself the operating rights contained in the *profit a prendre,* conveying to the assignee merely a fractional share of the oil and gas produced in the form of an overriding royalty. (See *Schiffman v. Richfield Oil Co., supra,* pp. 224, 225.) Thus, in so far as *Payne v. Callahan, supra,* holds that the fractional interests created either by the lessor or the operating lessee constitute a tenancy in common in a *profit a prendre* as a matter of law, it is expressly disapproved. In any case, the intention of the parties is controlling, and in the absence of a clear indication that such was the intent, the court will not construe royalty interests created for the duration of a specific oil and gas lease as granting the right to enter upon the land in question for the purpose of carrying on oil production or as creating a tenancy in common in the *profit a prendre* for that purpose. The instrument creating the overriding royalty interests of the defendants herein evidences no intent that defendants were to become tenants in common of the lessees' *profit a prendre.* The instrument recites the fact that the operating lessees were required to commence the drilling of an oil well and indicates that the defendants' only function was that of furnishing capital for this purpose. All actual operation was left in the hands of the lessees and it is clear that the parties contemplated no right of entry in the defendants for the purpose of drilling for oil and gas. It follows that no tenancy in common was

created in the *profit a prendre* of the operating lessees."

The *La Laguna* case was followed with approval in *Chase v. Trimble,* 69 C.A.2d 44, 158 P.2d 249 (1945), where the Court expressly held that there could be no cotenancy between the holder of an overriding royalty interest and the operating lessee where the operating lessee had the entire *profit a prendre,* that is, where he had the sole and exclusive rights of entry, exploration and production. See also:

Dabney-Johnston Oil Corp. v. Walden, 4 Cal. 2d 637, 52 P.2d 237 (1935);

Austin v. Hallmark Oil Co., 21 Cal.2d 718, 134 P.2d 777 (1943).

The basic test of cotenancy is whether *unity of possession* exists. As stated in *Dabney-Johnston Oil Corp. v. Walden,* 4 Cal.2d 637, 52 P.2d 237 (1935), at page 655:

"A tenancy in common is characterized by a single unity, that of possession, or of the right to possession."

Applying this test, was there any unity of possession between Kennedy and the operating companies of the rights existing under the pertinent documents, that is to say, the *profit a prendre?* Certainly not, because in and by those various instruments Kennedy conveyed away his entire right of exploration, entry upon and production of oil and gas, and he did not retain in himself any right in conjunction with the operating lessees to go upon the land for these purposes. Hence,

there was not and could not have been the necessary unity of possession to constitute Kennedy and the operating companies cotenants of the only estate there was, that is, the *profit a prendre.*

As we have shown, the Kennedy fee land must be put aside as having no relevancy whatsoever to the determination of the questions on this appeal. As to what we call the Kennedy lease lands, the only source of any cotenancy relationship between the parties must be in all or some of the exhibits. If these documents do not as a matter of law create such relationship, there is no foundation for any determination in the judgment that a fiduciary relationship of cotenancy existed, which prevented the statute of limitations from running. Appellant Honolulu submits that on this phase of the case, the law is conclusive that the documents created no such relationship.

3. Did any other relationship of a fiduciary nature, or of trust and confidence, exist between the parties by virtue of the pertinent agreements?

Since no relationship of joint adventure or cotenancy existed between Kennedy and the operating companies, appellees' claim must finally rest upon the assertion that some vague and undefined sort of fiduciary relationship existed between the parties simply because of the execution by them of the various documents in question.

Absent a true joint adventure and absent a true cotenancy, this is the only remaining support for the judgment. Just how lacking in seriousness this assertion is, will be evident, because such position means

that every ordinary oil and gas lease, assignment, or operating agreement somehow transmutes a contractual relationship between the parties into a fiduciary relationship.

There are, of course, many situations involving oil and gas leases, assignments and other agreements in which one of the parties may stand in a fiduciary relation to another, but an examination of the cases involving such situation will disclose that the fiduciary duty, in each instance, has arisen by reason of facts and circumstances extraneous to the instruments themselves, and which would impose a fiduciary duty in any circumstance. It certainly cannot be said that the ordinary every-day oil and gas lease, assignment or reservation of royalties, creates a fiduciary relationship rather than a contractual one.

The decision of the Court below is actually predicated upon the opinion of Judge Harris in the *Seaboard* case (99 Fed. Supp. 730). It is Honolulu's position that such opinion, *when applied only to the exhibits in this case and not to any extraneous facts—and there are no extraneous facts in this case—is clearly erroneous.*

Judge Harris' opinion (99 Fed.Supp. at page 732) quotes from *Summers on Oil and Gas,* Vol. 3, commencing at page 321, to the effect that where the assignment of a lease expressly provides that the reservation of an overriding royalty shall apply to extensions, renewals or modifications of the lease, this creates a relation of trust and confidence between the assignor and his assignees. Examination of this

quotation, however, demonstrates that it does not support the conclusion that the assignment of an oil and gas lease with the reservation of an overriding royalty ordinarily creates a fiduciary relationship between the parties. The cases cited by Summers for this proposition are cases which hold that the assignees of a lease, who take it with the knowledge of the fact that their assignor was obligated to pay an overriding royalty, are in the position of trustees for the overriding royalty holder where they obtain a *renewal* of the original lease from the lessor; in other words, it is obvious that the lessee, by the device of obtaining a renewal lease, cannot escape the obligation to pay the overriding royalty. In such a situation, there being no contractual remedy between the parties, the court will impose a fiduciary duty upon the lessee, who has attempted by obtaining a renewal, to defraud the royalty owner. Obviously, this line of cases has no application to the case at bar.

Judge Harris in his opinion did not cite the preceding language from *Summer on Oil and Gas,* Vol. 3, Section 554, at page 320, where Summers states:

> "While the right to overriding royalty, or a sum of money paid out of production of oil or gas, created in the assignment, does not survive the termination of the assigned lease, yet in a number of cases the assignor has claimed that the assignee, by permitting the lease to expire, or by surrender thereof, and the taking of a second lease from the lessor, has violated a relation of trust and confidence, and that the assignor should be entitled to such overriding royalty or money out of production under the renewal lease. *The mere as-*

> *signment of an oil and gas lease creates no such fiduciary relation. If it is created, it must be by the terms of the assignment.*" (Emphasis supplied.)

The above comments apply to the cases cited in Judge Harris' opinion at page 733 of 99 Fed.Supp., such as *Oldland v. Gray,* 179 F.2d 408 (C.A.10, 1950). There the assignee of a lease, who had knowledge of the existence of an overriding royalty, attempted to eliminate the royalty by obtaining a renewal of the lease from the United States after the expiration of the original lease. The plaintiff royalty owner had no contractual remedy, but the Court imposed a fiduciary duty upon the lessee whose inequitable conduct would otherwise have led to his unjust enrichment. This is obviously not the case at bar. It is interesting to note that in the *Oldland* case, the Court found that the parties were not tenants in common, mining partners, nor joint adventurers, by reason of their relationship.

In the instant case appellees always had their contractual remedy against appellant Honolulu and its predecessors in interest. No reasons exist for the Court imposing a constructive trust or finding that any fiduciary duty exists. If the decision of Judge Harris is taken to mean that, absent any extraneous circumstances, a fiduciary relationship arises out of and is created by nothing more than the documents which are exhibits in this case, then such opinion is simply erroneous.

The reservation of an overriding royalty, the execution of an oil and gas lease, or the assignment thereof,

does not in and of itself create any joint adventure, cotenancy, or any sort of fiduciary relationship between the parties.

McDonald v. Follett, 142 Tex. 616, 180 S.W.2d 334 (1944);
Julian Petroleum Corp. v. Courtney Petroleum Corp., 22 Fed.2d 360 (C.C.A.9, 1927);
Gordon v. Empire Gas and Fuel Co., 63 Fed.2d 487 (C.C.A.5, 1933);
Henry v. Gulf Refining Co., 179 Ark. 138, 15 S.W.2d 979 (1929);
Shropshire v. Hammond, 120 S.W.2d 282 (Tex. Civ.App. 1938);
Robinson v. Eagle-Picher Lead Co., 132 Kans. 860, 297 Pac. 697 (1931);
Phillips Petroleum Co. v. Johnson, 155 Fed.2d 185 (C.C.A.5, 1946), cert. den. 329 U.S. 730 (1946);
Phillips Petroleum Co. v. Bynum, 155 Fed.2d 196 (C.C.A.5, 1946);
O'Donnell v. Snowden & McSweeny, 318 Ill. 374, 149 N.E. 253 (1925);
Summers on Oil and Gas, Vol. 3, Sec. 554, p. 320;
75 *A.L.R.* 847.

As the Court stated in *Bunger v. Rogers,* 188 Okla. 620, 112 P.2d 361 (1941) at page 363 (of 112 P.2d):

> "The defendants were merely lessees under an oil and gas mining lease and were under no obligation to the plaintiff, other than to pay the rent and royalty provided in said lease, and if they

> breached this duty then their liability was purely a contractual one and in no sense fiduciary."

And as stated in *Phillips Petroleum Co. v. Bynum,* 155 Fed.2d 196 (C.C.A.5, 1946), at page 199, involving the payment of a royalty:

> "We have searched for some principle of law that would permit us to announce that when the defendant takes all the gas from the well and makes such disposition of it as best suits its purpose under a contract which does not state a definite sum to be paid for such gas, there arose either a fiduciary relation or a relation as principal and agent which would place the lessee under the duty to keep his principal fully informed and to disclose all facts that came to his knowledge and to fully and faithfully account to the lessor."

The Court concluded that there was no principle of law which established any such fiduciary relationship.

The principle is very clearly stated in *O'Donnell v. Snowden & McSweeny,* 318 Ill. 374, 149 N.E. 253 (1925), where the Supreme Court of Illinois said at page 255 (of 149 N.E.), speaking of an agreement to pay royalties:

> "Much of appellants' brief is devoted to an argument based on the assumption that a fiduciary relation existed between the parties to the supplemental agreement of 1914 and that appellee overreached appellants in making the agreement. There is no relation of special trust or confidence between the lessor and lessee in a gas or oil lease any more than in any other. Colgan v. Forest Oil Co., 194 Pa. 234, 45 A. 119, 75 Am. St. Rep.

> 695. Like all other contracting parties, they deal at arm's length, each for his own interest. The mere act of making the contract does not constitute proof of a fiduciary relation. Bordner v. Kelso, 293 Ill. 175, 127 N.E. 337."

Appellant Honolulu has shown that no joint adventure in fact existed between the parties; that no cotenancy in fact existed or could have existed between the parties; and, hence, no fiduciary relationship arising from one or both of these relationships came into being.

Lastly, no general fiduciary relationship exists between parties to oil and gas leases, assignments and reservations of royalty, such as we have here, merely by reason of their contractual relationship. There are no special facts in the case at bar which would move a court to impose a fiduciary duty. The only evidence in this case—the exhibits—does not create any such relationship.

The judgment appealed from is erroneous for the reason that its principle would convert every contractual relationship of whatsoever kind into a fiduciary relationship. The only obligation of the appellant and its predecessors in interest in the instant case was to *pay* an overriding royalty; and the appellant and its predecessors in interest always recognized this obligation and never attempted to defeat it by any inequitable conduct which would call for the imposition of a trust. Unless, therefore, every debtor is to be converted into a trustee for his creditors, the decision of the Court below should not stand.

POINT THREE.

APPELLEES CANNOT AVOID THE STATUTE OF LIMITATIONS BY ATTEMPTING TO CONVERT THEIR ACTION INTO ONE FOR EQUITABLE RELIEF.

Every asserted right of appellees arises out of and by virtue of various exhibits already discussed, all of which are nothing more than written contracts between the parties. As we have shown, these contracts do not in and of themselves create any sort of fiduciary relationship between the parties.

In this situation, it is settled that a party cannot avoid the bar of the statute of limitations by seeking to convert a simple contract action into an action for equitable relief, by the device of asserting a breach of trust or the existence of some undefined fiduciary relationship. The exact situation in the case at bar obtained in the case of *Fowler v. Associated Oil Co.,* 74 P.2d 727 (Supreme Court, California, 1937). (This case was not reported in the official California reports; the Supreme Court rendered an opinion in the case reported at the citation above given, and rendered a decision in a companion case at 74 P.2d 736. Thereafter, the actions were both dismissed pursuant to stipulation after the Supreme Court had granted a rehearing in one and denied a rehearing in the other case. The reasoning of the Supreme Court is particularly applicable.)

In the *Fowler* case the plaintiffs were owners of royalty interests, who commenced an action against the defendant lessee to impeach, on the ground of fraud, various accountings for royalties made by the defendant to the plaintiffs. It was conceded that the statute

of limitations had long since barred recovery unless some fiduciary relationship or breach of trust was involved. The plaintiff claimed fraud and constructive fraud but the Court held that the statute of limitations barred the asserted cause of action. The trial court had found that the plaintiff royalty owners "had implicit faith in the honesty and integrity of the defendant." The Supreme Court, however, at page 728 of 74 P.2d stated:

> "This is not, however, sufficient to make out a fiduciary relationship. There must be more than mere confidence in another's honesty and integrity to sustain the presumption of constructive fraud."

Speaking of the way in which the complaint was drawn in order to avoid the bar of the statute of limitations, the Court said at page 729:

> "Examination of the complaint wherein plaintiffs disclosed their cause of action indicates that it was one for breach of contract. Throughout the trial of the action plaintiffs consistently maintained that they were entitled under the lease to be paid for their royalty oil the prevailing market price of clean or dehydrated oil and the defendant by the employment of erroneous and incorrect methods of sampling and testing had not fulfilled its contract obligations. True, they claimed that defendant had defrauded them and sought to impeach the monthly accountings which defendants had rendered on the ground that defendant had acted fraudulently and in bad faith in making such accountings. The charge of fraud was, however, incidental to the real purpose and object of the suit which was to recover for breach of contract."

Thus, it is not permitted for a plaintiff to circumvent a statute of limitations in what is essentially a suit for a breach of contract, by the device of drawing his complaint in the form of a suit for an accounting, for breach of trust, or by the device of alleging the existence of a fiduciary relationship when none in fact exists.

> *Bendien v. Solov,* 89 C.A.2d 904, 202 P.2d 372 (1948);
>
> *Parker v. Shell Oil Co.,* 55 C.A.2d 48, 130 P.2d 158 (1942).

Exhibit "EE" is a specimen of the monthly accounting statements sent to Frank Kennedy by appellant's predecessors in interest, which reflected the royalty due him each month from all the lands and leases herein involved. It is settled law in California that each of these monthly statements became an account rendered at the time it was received by Kennedy, regardless of any objection that he might have had thereto, so that the statute of limitations commenced to run each month as to each such statement and account.

> *Rehbock v. Reservoir Hill Gas Co.,* 14 C.A.2d 233, 57 P.2d 1357 (1936).

Whether the appellees' cause of action be framed, as it should have been, for a simple breach of contract, or whether it be cast in the form of an action for an accounting, the 4-year statute of limitations of the State of California (either Section 337 or Section 343 of the California Code of Civil Procedure) commenced

to run and barred any recovery by the appellees four years after the rendition of each monthly statement.

Alamitos Land Co. v. The Texas Company, 11 C.A.2d 614, 54 P.2d 489 (1936);

West v. Russell, 74 Cal. 544, 16 Pac. 392 (1888).

As stated in the *Alamitos* case at page 618 of 11 C.A.2d:

> "If doubt be entertained as to the form of the monthly statements prior to August, 1928, whether or not they constituted accounts stated, or if question be raised as to the interpretation of the letter contract in effect at that time—whether it amounted to a contract of sale or bailment—the points become immaterial because recovery for that period would in any event be barred by the statute of limitations, being for a period more than four years antedating the commencement of the within action."

CONCLUSION.

The case before this Court is simple, despite the length of the complaint and the number of exhibits. The uncontradicted facts are: That appellant Honolulu and its predecessors in interest were operating oil and gas companies which had agreed to pay Frank Kennedy royalties on account of interests which he held in oil and gas bearing properties when he assigned those interests to these operating companies.

The appellant Honolulu and its predecessors accounted each month to Kennedy for his monthly

royalties on the basis of the prices which Honolulu and its predecessors themselves received from other oil companies for the oil which they produced and sold; Honolulu and its predecessors had no control over, nor voice in, the fixing of such prices.

The appellees claim that although Honolulu and its predecessors in interest accounted to Kennedy on the basis of the prices they received, they are nevertheless entitled to more because during the period of time in question an artificially depressed price (in which appellant had no hand) existed in the oil producing areas in question. No particular relationship existed between Kennedy and these companies except in so far as it might have been created by the various documents attached as exhibits. None of these documents created the relationship of joint adventure between Kennedy and the operating companies, nor did they make these parties cotenants in any sense of the word. Appellees nevertheless claim that some general fiduciary relationship was created by one or more of these documents and that for this reason the applicable statute of limitations never barred their claim.

What is a fiduciary? Professor Austin W. Scott defines a fiduciary as "a person who undertakes to act in the interest of another person." (*California Law Review,* Vol. 37, p. 540). It nowhere appears in this case that Honolulu or any of its predecessors in interest ever "undertook to act in the interest of" Frank Kennedy or any of the appellees herein. On the contrary, it clearly appears by the exhibits herein referred to that all dealings between the parties were

at arm's length, and were no more than the usual and every-day leases, assignments and other agreements in use in the oil and gas industry. These documents were executed by parties who were each acting in their own interest and who understood that fact at the time such documents were executed.

The decision of the Court below is incorrect in principle and must be reversed since, if it is allowed to stand, it would transmute every simple contractual relationship into a fiduciary duty and nullify the statute of limitations. For this reason, appellant Honolulu respectfully submits that the decision of the Court below should be reversed.

Dated, San Francisco, California,
June 11, 1956.

Respectfully submitted,
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